

A
 LETTER
 FROM

*A LAWYER at Edinburgh to his Friend
 in the Country.*

SIR,

THO I have sometimes been obliged to look into the *English* Law, the Knowledge whereof, in Matters of Treason, (since our Constitution and Laws on that Subject, have suffered so great an Alteration by the *Union*, and Acts thereafter past in the *British* Parliament,) is now become necessary to us: Yet I should have been at a loss, in giving you any tolerable Satisfaction on the Queries you are pleased to put to me, *Whether Grand Juries, as Judges, are to notice Law as well as Fact; or only what shall be proven of the Fact laid in the Indictment?* Was it not that I have had Occasion to peruse two little Books, said to be written by *English* Lawyers, eminent in their
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Profession, and of great Knowledge in the Constitution of their Country, the one intituled, [*The Security of English-Men's Lives ; or, The Trust, Power and Duty of the Grand-Juries in England.*] And the other, [*A Guide to Juries, setting forth their Antiquity, Power and Duty, from the common Law and Statutes.*] The first I'm informed is to be re-printed in this Place, and I cou'd wish the other were so likewise ; for, if it has been thought proper to publish these or such other Books for the Instruction of the Commons of that Part of the united Kingdom, who have so frequent Occasions of being on *Grand Juries*, or at least to understand the Method of their Procedure, and to see that Trust and Power the Law of the Land has reposed in them put in Practice, it will doubtless at first View seem necessary among us, who are altogether Strangers to Proceedings of this Nature.

I presume then I shall have fully answered what you expect of me, if I show from Passages in these Books, and the Consequences which naturally follow from the Principles laid down in them, that the *Grand as well as Petit-Juries* are Judges, that their Office and Power is judicial, that they complicateately resolve both Law and Fact, leaving you (which you will easily do) to apply these general Positions to your other Query, *Whether Grand Juries in the Case of an Act of Grace, may of their own proper Motive notice, or rather by Law are bound to notice such Act, where the Forms allow no Opportunity to plead it before them ?*

Now this is plainly asserted in so many Words
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by the learned Author of the Book intituled, [*The Security of English-men's Lives*] Pag. 5. where he says, *The Office and Powers of these Juries* (that is, both *Grand* and *Petit*, of whom in the Lines immediately preceeding he treats) is *JUDICIAL*. They *ONLY* are the *JUDGES*, from whose Sentence the indicted are to expect Life or Death. Upon their Integrity or Understanding, the Lives of all that are brought into Judgment, do ultimately depend. From their Verdict there lies no Appeal. By finding guilty or not guilty, they do complicateately resolve both Law and Fact.

So likewise the Author of the other Book says, Pag. 17. Edit. Lond. 1699. Jury-men have also the Determination of Law, but with this Difference from that of Fact: That 'tis necessary they determine the Matter of Fact. But they may either refuse to meddle with any Thing of Law, and leave it to the Judges; or at their Election may take upon them Knowledge of the Law, and determine both Fact and Law themselves. For which he cites Littleton, Sect. 368. And Pag. 20. he says, *The ancient Books called Jury-men Judges*, as *Mirroure of Justice* Pag. 209. And where he treats of the Duty of *Grand Juries*, Pag. 40. he says, *They must consider if the Fault, as alleged with the Circumstances and Aggravations, amount to, and be a real Fault or not, and also worth complaining of: If it be no Fault, or one not worth complaining of, which in Law is all one, they reject the Bill, and meddle no more with it.* That is, in short, they judge of the Relevancy (as we call it) of the Indictment, which you know, Sir, was the proper Province of our Judges in all Crimes before the Union, and still remains to be so in all other Crimes

Crimes except Treason, which now by the Act of the 7th of the late Queen, intituled, [*Act for rendring the Union more complete*] is to be tried after the *English* Form, that is, by *Grand Juries*.

The last mentioned Author, Page 44, proceeds to illust^rate this Point, by shewing that the finding of the Bill by the Grand-Jury is an essential part of the Tryal. *It's true*, says he, *It's no determinative Tryal that finally concludes either Party, because it's but one of two, which every one accused of a Crime must have, but it's so much a Tryal as learned Fleta, Fol. 113, looks upon it no less one, than any other. The Form of their Indictment is the same with that of a Verdict; all things are, or ought to be alike in the whole Proceedings, and to differ nothing, but the one to be before the other, the latter to be final, the other not; The Stat. of 23 H. 8th Cap. 23. enacts, One shall be indicted of High Treason in what County the King pleases. And the Statute, 1 and 2 Phil. and Mar. Cap. 10th says, Tryals for Treason shall be according to common Law. This Act repeals the other, tho' it speaks only of Tryals, and the other of Indictments, which shews, an Indictment is a Tryal. One of the Grand-Jury cannot be afterwards on the other. And why? Says the Law, for he has once already found the Party guilty, and if he should not again, he must perjure himself.*

Thus you see, what the Grand-Jury does, is as much a part of the Tryal, as what is done by the Petit-Jury, and what is found by the Grand Jury, is as much, in the Construction of Law, finding the Party indicted Guilty, or not Guilty, as the Verdict of the Petit-Jury. In Crimes
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the one cannot proceed without the other ; what both do, makes up the whole Tryal, and both Juries are equally Judges of Law and of Fact.

And was it otherwise, that is, if Grand-Juries were not Judges of Law as well as Fact, instead of being the great Bulwark of the Liberties of the Subject, as they are justly reputed to be, they would, in my humble Opinion, be of little significance, yea they might prove often a Snare to the Innocent. For suppose a Man was indicted of Felony, for Exportation of Wool, upon the Stat. 14 Car. Cap 18. he may be brought to great Vexation, if the Grand-Jury might not, or in Conscience were not bound to notice the subsequent Statute 7. and 8. *Gal. 3tii Cap. 28*, which repeals so much of the former Statute, as declares the Exportation of Wool Felony. And many other Instances of the like kind may be given, where subsequent Laws repeal and alter the Penalties in the former. But the Grand-jury, if they have knowledge of these Laws, could not find a Bill upon such Statutes as are repeal'd, no more than find such a Bill without Evidence of the Fact. The Application to the Case, which you propose, seems so obvious, that it is needless to insist upon it ; only thus far may be further observed, that where a subsequent Law takes off the Penalty of a former, it seems to resolve in a Question of Fact, rather than of Law: And so in the Case of the Act for his Majestie's most gracious, general and free Pardon, it is enacted by the penult Clause, *That every Person may plead the general issue, without special Pleading of this Pardon ;*
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and give this Act of Pardon in evidence for his Discharge: And therefore I cannot think, that, were any such Tryals to be before Grand-Juries, upon whatever Crimes, any Difficulty could remain, but whether the Party indicted was truly comprehended under the pardoning Clause of his Majesty's Act of Grace, (which is as full as can be devised, enacting, That his Majesties Subjects be not sued, vexed or unquieted in their Bodies, Goods, Chattels, Lands, &c. for any Matter, Cause, Forfeiture, Offence, &c. done or committed before the Time therein limited,) or if the said Party be comprehended under one or other of the Exceptions.

Edinburgh,
14. June 1718.

I am, &c.

Φ.ΚΚ
Howey
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